BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of: REVIEW OF THE SECTION 251 UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS, et al.	CC Docket No. 01-338 CC Docket No. 96-98 CC Docket No. 98-147 FCC Docket No. 03-36

COMMENTS OF THE IOWA UTILITIES BOARD

Introduction

On August 21, 2003, the Federal Communications Commission (Commission) released a *Report and Order on Remand and Further Notice of Proposed Rulemaking* in CC Docket No. 01-338 (*Triennial Review Order and FNPRM)*. The Commission adopted new network unbundling requirements pursuant to section 251 of the Communications Act of 1934, 47 U.S.C. § 251. In addition, the Commission initiated an inquiry regarding proposed modifications to the existing rules implementing section 252(i) (the "pick-and-choose" rule), which requires incumbent local exchange carriers (ILECs) to make available to other telecommunications carriers interconnection agreements approved under section 252. The existing "pick-and-choose" rule permits requesting carriers to opt into individual portions of interconnection agreements without accepting all the terms and conditions of such agreements. The rule was adopted pursuant to section 252(i), which states:

> **Availability to Other Telecommunications Carriers**: A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The Commission also incorporated a related Petition for Forbearance and Rulemaking[1] filed by Mpower Communications (Mpower) and the comments and *ex parte* filings made in response to Mpower's petition.

The Commission seeks comment on two central issues. The first issue is whether the Commission has legal authority to alter its interpretation of §252(i) in light of the Supreme Court's characterization of the Commission's current rule as "the most readily apparent" reading of the statute. The Commission states that it may adopt a different rule pursuant to 252(i) as long as the modified rule is a reasonable interpretation of the statutory text.

The second issue on which the Commission is seeking comment is whether it should adopt a policy providing that if an incumbent LEC does not file and obtain state approval for a statement of generally available terms and conditions (SGAT), the current pick and choose rule would continue to apply to all of that incumbent's interconnection agreements. If an incumbent LEC does file and obtain state approval for an SGAT, the current pick and choose rule would apply solely to the SGAT and all other interconnection agreements entered

[1] *Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick-and-Choose*", CC Docket No. 01-117, Petition for Forbearance and Rulemaking, May 25, 2001.

into by that incumbent would be subject to an “all-or-nothing” rule requiring third parties to adopt the interconnection agreement in its entirety.

Discussion

Iowa's Experience with "Pick and Choose"

Iowa's experience is that the current “pick and choose” rule does not create or present an entry barrier for CLECs in Iowa and does not appear to be having any adverse effect on negotiations between CLECs and ILECs. Since 1997, the first year of any filings, 144 negotiated interconnection agreements have been filed with the Iowa Utilities Board ("Board" or "Iowa"). These filings have been the subject of numerous negotiated amendments; there were 226 total filings (negotiated agreements and negotiated amendments) from 2001 through mid-September 2003, as shown on the following table:

	2001	2002	2003	Total
New Agreements	42	33	24	99
Amendments	40	55	32	127
Total Annual Filings	82	88	56	226

The majority of the amendments were the first amendment to a particular agreement, but several agreements have been subject to multiple amendments. One agreement had 10 amendments. This shows there is a significant amount of negotiating activity in Iowa, especially in light of the fact that the last couple years have not been kind to any LEC. Moreover, the Board has not been required to hold any contested interconnection agreement proceedings in this time frame. These facts show that the parties understand the existing process and find it to be a workable one. It would appear the current “pick and choose” rule helps new CLECs enter the market, as each CLEC does not have to enter into expensive and potentially protracted negotiations with the ILEC; instead, the CLEC is able to gain the same rates, terms, and conditions that other CLECs have.

Mpower and the incumbent LECs have raised a concern that the current rule may not allow an ILEC to make significant concessions in return for some particular trade-off, because other CLECs might then take advantage of the beneficial term without agreeing to the a similar trade-off. The result could be that all carriers wind up with substantially similar interconnection agreements, leading to a certain "sameness" in the marketplace and potentially stifling innovation. Mpower and others support a FLEX contract proposal as a response. However, the significant negotiating activity described above would indicate that these concerns are not yet causing any market difficulties. These potential problems may become more evident in the next few years, but it is also possible that they will never arise. For this reason, Iowa does not believe the time is ripe for changing the rules. If, however, a change is adopted, Mpower's FLEX contract proposal is not an appropriate response.

The Board has the same concerns the Commission has with the original FLEX contract as envisioned by Mpower. First, the FLEX contract would not protect against an incumbent LEC that places a poison pill into a contract. For example, the incumbent could negotiate special terms with one CLEC and then insert rates or terms for services not wanted or needed by that particular CLEC in order to prevent the adoption of the agreement by other CLECs. This scenario is not unrealistic; the Board recently dealt with "secret" interconnection agreements between an ILEC and several CLECs that granted special terms and conditions to those selected CLECs. The contracts came to light as a result of another proceeding, and the Board had to review several interconnection agreements and ensure that the secret terms and conditions were made available to other CLECs.[2]

The Board's second concern centers on the exemption of these contracts from state commission approval. Simply stated, section 252(e)(1) requires approval of interconnection agreements by state commissions. The section states:

> **Approval required:** Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

This language is clear. The Mpower FLEX contract proposal therefore would not be a viable alternative, at least as originally proposed. The states are required to review and approve interconnection agreements.

This does not have to be a burdensome process. The Board's process requires only to file a copy of the agreement with the Board for a review to determine if there is a competition or discrimination problem. Most interconnection agreements are reviewed and approved in an average of less than 33 days. This includes a 30-day public comment period. This is not a burdensome procedure for the parties, but it is sufficient to discourage unreasonable terms such as poison pills and it ensures all agreements are publicly available.

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[2] Docket No. INU-00-2, SPU-00-11; *Order to Consider Unfiled Agreements* issued June 7, 2002.

The Commission's Alternative Proposal Appears To Be Workable

The Commission proposes to reinterpret section 252(i) to limit carrier's opt-in rights to the entire agreement, subject to the SGAT condition. The Commission would also retain the state commission's approval requirement. In making this alternative proposal, the Commission recognizes that the Act requires only Bell Operating Companies (BOCs) to file SGATs and requests comments on whether the SGAT scenario should apply to non-BOC incumbent LECs.

At this time, Qwest Corporation is operating in Iowa with an SGAT.[3] Thus, the first part of the Commission's alternative would not affect Iowa. The second part would allow third parties to pick and choose from the SGAT but not from other interconnection agreements. All other interconnection agreements would then be subject to the "all-or-nothing" rule, meaning the interconnection agreement would have to be adopted in its entirety by the third party.

This proposed revision is a compromise between the current "pick and choose" rule and the original FLEX contract proposal. A new CLEC would continue to have a known set of alternatives with the SGAT. The CLEC would have the option to enter negotiations with the incumbent knowing that it could always opt into an existing agreement in its entirety or into selected parts of the SGAT. If the Commission determines it has legal authority to alter its interpretation of the statute, this proposal should be a workable compromise.

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[3] Qwest's initial SGAT was approved by the Board in its *"Process for Evaluation of Impasse Issues, Performance Assurance Plan, and Updated SGAT"* Order in Docket No. INU-00-2 (SPU-00-11), issued on August 15, 2001. The most recent Qwest SGAT is the 6th Edition, filed with the Board on June 10, 2002.

Conclusion

The Iowa Utilities Board believes the "pick and choose" method is still working well and it is not yet time to change it. The filing of interconnection agreements is subject to the Board's approval and as a matter of law that process continues to be required. There may be some potential benefit from increased market diversification if the Commission adopts its proposed SGAT alternative, but the timing is a concern. Local exchange competition should be allowed to increase under the current rules before the current "pick and choose" rule is modified.

October 2, 2003

Respectfully submitted,

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